No. 13559

In the United States Court of Appeals For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

ALASKA STEAMSHIP COMPANY and AMERICAN RADIO ASSOCIATION, CIO, *Respondents.*

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR RESPONDENT ALASKA STEAMSHIP COMPANY

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On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR RESPONDENT ALASKA STEAMSHIP COMPANY

JURISDICTIONAL STATEMENT

This case is before the Court on petition of the National Labor Relations Board, herein called the Board, pursuant to Section 10 (e) of the National Labor Relations Act, as amended (29 U.S.C.A. §151, *et seq.*), herein called the Act, for enforcement of its order issued on February 11, 1952, against Alaska Steamship Company, herein called the Company, and American Radio Association, CIO, herein called the Union. This Court has jurisdiction of these proceedings under Section 10(e) of the Act (29 U.S.C.A. §160(e)). The Board's Decision and Order (R. 97-105, 24-87) are reported at 98 NLRB 22. Pertinent portions of the Act are set forth in Appendix A hereto. Where references to sections are made herein, such references are to sections of the Act unless otherwise specified.

STATEMENT OF FACTS

A. The Business of the Company.

The Company is a corporation organized and existing under the laws of the State of Washington and has its principal office and place of business in Seattle, Washington. It is engaged primarily in the operation of ocean-going vessels for the transportation of passengers and cargo between ports in the United States and ports in the Territory of Alaska (R. 9-10, 18, 125).

B. Statement of the Pleadings.

This case arose upon original charges of unfair labor practices filed by Horace W. Underwood, a marine radio operator, against the Company and the Union on January 17, 1950 (R. 3, 5, Gen. Counsel Exh. 1). Amended charges were filed against the Company on March 20, 1950, and against the Union on January 22, 1951 (R. 3, 5, Gen. Counsel Exh. 1). On January 22, 1951, the Regional Director, 19th Region of the Board, issued a consolidated complaint against the Company and the Union. In substance the complaint alleged: (1) that the Company and the Union on December 3, 1948, entered into a collective bargaining agreement, later amended by agreement of July 14, 1950, which agreement and amended agreement provided that the Company would secure radio operators for its vessels from offices of the Union and containing preferential hiring provisions allegedly unlawful because beyond the permissible limits prescribed in Section 8(a)(3); (2) that the Union had in effect following May 15, 1949, shipping rules, and assignment lists administered by the Union pursuant thereto, according to which the Union

allegedly restricted to Union members referrals to positions as radio operators with the Company and other employers; and (3) that the Company, by acquiescing in and consenting to the practice of obtaining radio operators from the Union, whereby the Union allegedly refused to dispatch Underwood to employment as a radio operator with the Company or any other employer following December 1, 1949, engaged in unfair labor practices within the meaning of Sections 8(a)(1) and (3), and that the Union engaged in unfair labor practices within the meaning of Sections 8(b)(2) and (1)(A) (R. 9-18).

Answer to the consolidated complaint was duly filed by the Company in which it admitted facts relating to the business of the Company but denied in all respects that it had engaged in unfair labor practices (R. 18-21). The Union likewise filed answer in which it denied that it had engaged in unfair labor practices (R. 21-2).

Following hearing and taking of testimony, the Trial Examiner on July 3, 1951, issued his intermediate report and recommended order (R. 24-87). Both the Company and the Union duly filed exceptions to the intermediate report and recommended order (R. 87-91, 92-7).

On February 11, 1952, the Board issued its Decision and Order (R. 97-105). The Board filed petition for enforcement of its order in this Court (R. 265-7) to which petition the Company and the Union each duly filed answers (R. 270-7, 278-90).

A stipulation has been entered into whereby the parties agreed that none of the exhibits which have been introduced by any of the parties need be printed and that

this Court may use and consider the original exhibits which are on file in the case (R. 291-2).

C. The Agreements Involved.

In 1948 the Company was a member of Pacific American Shipowners Association, herein called PASA. On behalf of the Company and other employers, PASA entered into a collective bargaining agreement dated December 3, 1948, herein called 1948 agreement, with the Union (Gen. Counsel Exh. 3). The 1948 agreement provided in part as follows (Gen. Counsel Exh. 3, p. 2):

> "PREFERENCE OF EMPLOYMENT
>
> "Section 1. Employers agree to recognize the Association as the authorized collective bargaining agent for all Radio Officers employed by the Employers and when filling vacancies preference of employment shall be given to members of the Association.
>
> "HIRING
>
> "Section 2. The names of all unemployed members of the Association shall be placed on the Association's unemployed lists at the various offices of the Association. The offices of the Association shall be the central clearing bureaus through which all arrangements in connection with the employment of Radio Officers shall be made. For the purpose of promoting safety of life and property at sea, and to guarantee as far as is practical equal distribution of work among all members of the Association, the parties hereto agree that vacancies shall be filled in the following manner. Preference shall be given the Radio Officer longest unemployed who can present proof of previous employment and/or experience on a job or jobs similar to that

which is offered, and who in the judgment of the Employer is qualified, competent, and satisfactory to fill the job.

"When any Radio Officer is rejected, the Employers shall furnish a statement in writing to the Association stating specifically the reason why he is not qualified, competent, or satisfactory to fill the job. * * * "

During 1949 PASA was succeeded by the Pacific Maritime Association, herein called PMA, a newly-formed Coast Association of employers.

In a case unrelated to the present proceeding, and designated *Pacific Maritime Association,* Case No. 20-CA-166, the Board previously considered the validity of the hiring provisions of the 1948 agreement. 89 NLRB 894. The Board in that decision found and concluded that the mere execution of the 1948 agreement, which contained unlawful preferential hiring provisions, violated Section 8(a)(1). The Board ordered that PMA (as successor to PASA) cease giving effect to the 1948 agreement. The decision in Case No. 20-CA-166 was rendered by the Board on April 28, 1950. Following that decision and pursuant to the Board's order entered therein, PMA and the Union negotiated a new agreement dated July 14, 1950, herein called the 1950 agreement, and made effective April 28, 1950 (Gen. Counsel Exh. 4). The 1950 agreement contained no provision giving preference of employment to members of the Union (Gen. Counsel Exh. 4, p. 2).

Although counsel for the General Counsel alleged in this case that the 1950 agreement contained unlawful preferential hiring provisions, the Trial Examiner rec-

ommended dismissal of, and the Board dismissed, all allegations relating to the invalidity of the 1950 agreement (R. 41-2). The Trial Examiner also recommended dismissal of, and the Board dismissed, all allegations to the effect that any discrimination occurred in the administration of the 1950 agreement (R. 42-7).

Furthermore, because the validity of the hiring provisions contained in the 1948 agreement (Gen. Counsel Exh. 3) had already been litigated in Case No. 20-CA-166 that issue was not relitigated in this case (R. 39-40).

In its present posture, this case does not present any issues with respect to the validity of the 1948 or 1950 agreements. The only issues here involved relate to alleged discrimination against Horace W. Underwood.

D. Facts Relating to Horace W. Underwood.

The Company has utilized the employment offices of the Union, or its predecessors, for securing sea-going radio operator personnel since 1935. The Company maintains no facilities for hiring such personnel directly. The practice in the industry has likewise been to secure other categories of sea-going employees through the employment offices of the collective bargaining agent representing employees in the particular classification involved (R. 256-7).

Underwood was continuously employed as radio operator by the Company on the Coastal Rambler commencing April 2, 1949, and terminating on or about August 6, 1949 (R. 110-13, 140-2). This was a permanent job (R. 142-3, 154, 166, 170, Union Exh. 5). At that time Underwood was a member of the Union (R. 110,

Union Exh. 6), and was dispatched to the vessel by the Union (R. 142). On or about August 6, 1949, the COASTAL RAMLER laid up, became inactive, and the entire crew paid off, including Underwood (R. 141). At that time, under rules uniformly applied in the operation of the Union's rotary hiring system, Underwood had a recognized union right to "stand by" his job on the COASTAL RAMBLER and sail with the vessel at such time as she resumed active operation (R. 142-3, 167-8). However, Underwood decided to draw unemployment compensation; under applicable rules and regulations of the State Unemployment Compensation Department, Underwood could not "stand by" his job and draw unemployment compensation because he would not be actively seeking employment (R. 137, 142-3, 150, 164-5, 168). Underwood decided to draw unemployment compensation and relinquish his union right to "stand by" the job on the COASTAL RAMBLER (R. 143, 167). He was then placed on the "active" list at the employment offices of the Union for subsequent dispatch in normal course under the rotary hiring system (R. 144, 166-9, Union Exh. 5).

On or about September 11, 1949, Underwood was offered and accepted through the rotary hiring system, a "relief" job on the PALISANA (R. 113-14, 145-6, 159-60, 233, Union Exh. 5), which he retained until November 22, 1949 (R. 114, 146). At that time the vessel laid up and the crew paid off, including Underwood (R. 145, Union Exh. 5). The termination of this relief job again had the effect of putting Underwood back on the Union's "active" list in a lower position, since under the principles of rotary hiring "employed" radio operators

dropped 30 places per week on the Union's assignment list during their period of employment, whether employed on a relief or permanent job (R. 114-15, 118, 139-40, 192-3).

At the time his relief job terminated on the PALISANA on October 21, 1949, Underwood testified that under *old* shipping rules of the Union, no longer then in effect, he would have been entitled to keep the job on the PALISANA as a permanent one when the vessel next sailed (R. 113). The evidence clearly shows, however, that under the shipping rules then applicable the "relief" job terminated and the position on the PALISANA was properly offered to the man or men next on the assignment list in normal course of dispatch (R. 114-5, 176-7).

Underwood was then placed on the Union's active list, under the rotary hiring system, on December 1, 1949 (R. 131, Union Exh. 5). During all of this period just discussed, Underwood was a member of the Union (R. 110, Union Exh. 6) and had been dispatched to vessels operated by the Company through the employment offices of the Union (R. 142), Union Exh. 5).

The foregoing background evidence is highly significant because it pointedly demonstrates the basis for certain prejudices entertained by Underwood and is the starting point for his subsequent conduct and position in this case. An understanding of this background is pertinent in appraising the conduct of the Company and the obligations under the Act of both the Company and Union with respect to Underwood.

Underwood had, for some years past, and at the per-

tinent times material to this case, wanted to work only in a permanent job and only on vessels operated by the Company, and he consistently refused job opportunities on other runs for other companies (R. 115-18, 138-9, 147-9, 155-7, 172-3). Because of his desires in this respect, Underwood believed that the rotary hiring system operated unfairly as to him because he was only seeking permanent jobs with the Company, pursuant to his own desires, whereas other radio operators were seeking all job opportunities with all companies under the rotary hiring system (R. 149, 153). Underwood described this condition as "discrimination" against him but obviously it has nothing to do with "discrimination" as defined in Section 8(a)(3) since no element of union or non-union affiliation enters the picture at all. Underwood described this condition as a "roulette wheel" (R. 163-4). Underwood has used the word "discriminated" in a broad sense and apart from its specific designation under the Act.

Because of his belief that the rotary hiring system operated unfairly against him, Underwood "got mad" at the Union and resigned from the Union by writing a letter of resignation dated December 28, 1949 (R. 113, 115, Union Exh. 6). His testimony and the letter of resignation establish that his reason for resigning was *his opposition to the rotary hiring system,* not because of any union or nonunion aspects thereof, but solely because of his belief that the system operated unfairly as to him in obtaining permanent jobs with the Company (R. 114-5, 149, Union Exh. 6).

The Union interpreted Underwood's letter of resig-

nation to mean that he no longer wished to ship through or utilize the employment offices of the Union for obtaining dispatch to jobs (R. 181, 254). Underwood's name did not appear on the Union's national assignment list in the week following January 7, 1950 (R. 230, 251). The resignation of Underwood from the Union and the subsequent omission by the Union in the week following January 7, 1950, of Underwood's name from the Union's national assignment list, were events which were never called to the attention of the Company.

Immediately prior to his resignation from the Union, Underwood attempted to secure employment in preference to those on the Union's rotary hiring list by applying directly to the Company for a position as marine radio operator (R. 126-9, Gen. Counsel Exh. 8). Following his resignation from the Union, Underwood likewise expressed interest, in numerous letters which he wrote to the Company during the period from March 3, 1950, to May 25, 1950, in obtaining employment directly from the Company without reference to the rotary hiring system (R. 160-1). In these letters no mention was made by Underwood of his union or non-union status; Underwood simply expressed a continuing interest in obtaining employment with the Company, expressed *his opposition to the rotational hiring system of assignment of radio operators,* and his thoughts about a system of hiring based upon seniority *with one company,* which in Underwood's judgment would have afforded him a better chance of employment by the Company (R. 160).

In response to some of Underwood's letters received

in March, 1950, and to his application for employment theretofore filed with the Company, the Company wrote to Underwood on March 29, 1950, advising him as follows (Gen. Counsel Exh. 9):

> "Reference is made to application for employment heretofore filed with us. We are unable to give consideration to applications for employment made to us by mail. We make use of the employment facilities of the office maintained by the American Radio Association, CIO, at 3138-3139 Arcade Building, Seattle, Washington.
>
> "You are requested to register with that office and we have requested that you be dispatched to us without discrimination. A copy of our letter of even date to the American Radio Association, CIO, is enclosed. If after so registering you consider that any discrimination has been practiced against you, kindly advise us in writing."

On the same date, March 29, 1950, the Company wrote a letter to the Union's Seattle branch office, a copy of which was forwarded to Underwood, in which the Company advised the Union as follows (Gen. Counsel Exh. 10):

> "The following have made written application for employment with us as radio officers:
>
> | *Name* | *Date* |
> |---|---|
> | Horace Watson Underwood | December 29, 1949 |
> | Dallas Hughes | December 12, 1949 |
>
> "We request that when radio officers are ordered from your office that these applicants, upon registering with you, be dispatched without discrimination as to union or non-union affiliation or other discrimination whatsoever, anything in our collective bargaining agreement to the contrary notwith-

standing. It is also requested that their registration with you be deemed effective from the date of the application filed with us. We, of course, reserve the right to reject for sufficient cause any person dispatched to us.

"We enclose copy of form of letter being mailed to both of the applicants."

Underwood received the letter from the Company (Gen. Counsel Exh. 9) together with a copy of the letter to the Union (Gen. Counsel Exh. 10) on March 31, 1950; after receiving the letter he proceeded on the Monday following receipt of the letter (April 3, 1950) to the employment offices of the Union, requested to be dispatched, and he subsequently advised the Company of his action in this respect (R. 146-7, 174).

On April 12, 1950, the Company wrote to the Union at its Seattle office enclosing a letter of April 3, 1950, written to the Company by Underwood in which, according to the Company's April 12, 1950, letter to the Union, Underwood expressed the opinion that the Union would discriminate against him. The letter of April 12 from the Company to the Union, concluded with the expression that the Company trusted that there would be no discrimination against Underwood or Hughes. On April 19 there was a response by Ralph Miller, then Port Agent for the Union, to the Company's letter in which Miller *stated that Underwood and Hughes had been listed for employment, and that there would be no discrimination against them* (R. 178). Subsequent to this exchange of correspondence Underwood did not advise the Company of any alleged instances of discrimination against him in the normal channel of em-

ployment—the hiring offices of the Union—and the evidence establishes that in fact there were none.

Even Underwood himself did not deny that the shipping rules were at all times applied as equally to him as to members of the Union. The undisputed testimony of Mr. Lundquist, Port Agent for the Union following Miller, establishes that between December 1, 1949, and June 1, 1950, radio operators, both union and non-union, were dispatched indiscriminately to employment if they filed applications (R. 255, 220). The employment opportunities of the Union were made equally available to union and non-union members between December 1, 1949, and July 1, 1950 (R. 255).

At all times subsequent to April 3, 1950, Underwood received equal treatment in the normal channel of employment, the employment offices of the Union. He was offered at least three jobs by Miller, then Port Agent for the Union (R. 116-7, 132-3, 138-9), all of which Underwood refused. During the summer Miller attempted to contact Underwood and found that he was employed in Alaska (R. 254). Underwood left for a job in an Alaska cannery on July 23, 1950. (R. 134). Following his return from Alaska, Underwood contacted Lundquist, who had replaced Miller as Port Agent for the Union in September, 1950, on or about October 9, 1950, and advised Lundquist that he was again available for employment only in certain limited categories of jobs —permanent assignments to vessels of the Company engaged in short runs (R. 194). Underwood was offered several jobs between October 9, 1950, and February 27, 1951, all of which he refused (R. 155-7, 239-42).

On the latter date Underwood was offered and accepted a permanent job on the PACIFICUS, a vessel operated by Coastwise Line in the Alaska trade (R. 171, 241).

Underwood himself testified that, according to his own best judgment and based upon his position on the "active" Union assignment list when he terminated on the PALISANA in November, 1949, "without the Korean war I would not have been employed on the Alaska ships until the spring of 1951" (R. 114-5, 175-6). This was confirmed by Lundquist and was due to a general slump in shipping and unemployment conditions in the industry (R. 186-7, 228-9). That Underwood would not have received assignment to Alaska vessels of the Company between December, 1949, and November 8, 1950, even with the intervening Korean war, is clearly established by the chronological history of jobs filled on vessels of the Company during that period (Union Exh. 27, R. 230-9). Even had he remained a member of the Union during that entire period, Underwood would not, under the normal operation of the Union's rotary hiring system, have been referred to any permanent job on vessels of the Company between December, 1949, and November 8, 1950. This period includes the date of May 5, 1950, on which one Lewis Deyo was dispatched by the Union to the Company's vessel ALASKA as second assistant radio operator.

THE CONCLUSIONS OF THE BOARD

The Board concluded that preference of employment to members of the Union resulted in an unlawful denial of employment to Underwood on May 5, 1950, when Lewis Deyo rather than Underwood, was referred by the Union to the position of second assistant radio operator on the Company's vessel ALASKA; that the Company therefore discriminated against Underwood in violation of Section 8(a)(3) and (1); and that, by causing the Company to do so, the Union violated Sections 8(b)(2) and (1)(A) (R. 99, 65-8). In this respect the Board agreed with the conclusions of the Trial Examiner.

The Board also concluded that the act of removing Underwood's name from the Union assignment list itself constituted discrimination in violation of Sections 8(a)(1) and (3) by the Company, and Sections 8(b)(1)(A) and (2) by the Union (R. 99). In this respect, the Board went beyond the findings and conclusions of the Trial Examiner.

THE ORDER OF THE BOARD

The Board's order (R. 100-105) directs the Company, its officers, agents, successors and assigns to cease and desist from (1) encouraging membership in the Union, or in any other labor organization, by refusing to employ applicants for employment because they are not members of the Union, and discriminating against any employees for this reason except to the extent authorized by Section 8(a)(3); and (2) in any like or related manner interfering with, restraining or coerc-

ing its employees in the exercise of rights protected by the Act.

The Board's order directs the Company to take the following affirmative action which the Board found will effectuate the purposes of the Act: (1) offer Underwood employment as a radio operator on its vessel ALASKA, or in a substantially equivalent position; and (2) post certain notices in its offices.

The Board's order directs the Union to cease and desist from (1) causing the Company to refuse to employ applicants for employment because they are not members of the Union; and (2) in any like or related manner restraining or coercing employees of the Company in the exercise of rights guaranteed by the Act.

The Board's order likewise directs the Union to take the following affirmative action which the Board found would effectuate the purposes of the Act: (1) On proper application and request, restore Underwood's name to its assignment list and refer him to assignments without discrimination; and (2) post certain notices in its offices.

The Board's order affirmatively directs that the Company and the Union, jointly and severally, make whole Underwood for any loss of pay he may have suffered by virtue of the alleged discrimination against him.

SPECIFICATION OF ERRORS RELIED UPON

It is the position of the Company that the following findings and conclusions of the Board, and all subsidiary findings and conclusions related thereto upon which such findings and conclusions are based, are not supported by substantial evidence on the record considered as a whole, are not supported by the findings, are contrary to law, and for that reason the portions of the Board's order predicated thereon are improper, are contrary to law, and are beyond the powers of the Board:

1. That the Company discriminated against Underwood in violation of Sections 8(a)(3) and (1) of the Act, and that by causing the Company to do so, the Union violated Sections 8(b)(2) and (1)(A).

2. That the failure to offer Underwood the assignment as second assistant radio operator on the ALASKA on May 5, 1950, filled by Lewis Deyo, was discriminatory within the meaning of the Act.

3. That on May 5, 1950, Underwood was unlawfully denied employment.

4. That the act of removing Underwood's name from the national assignment lists of the Union constituted discrimination in violation of Sections 8(a)(1) and (3) by the Company and Sections 8(b)(1)(A) and (2) by the Union.

5. That the Company had knowledge of Underwood's union or non-union status at any time material to this case.

6. That Underwood would have chosen to stand by the ALASKA following October 14, 1950.

It is the further position of the Company that the Board's order in its entirety is improper as against the Company and especially in the following particulars, to-wit:

1. In ordering that the Company offer any employment whatsoever to Underwood.

2. In ordering that the Company and the Union, jointly and severally, or in any manner, make whole in any manner Underwood for any alleged loss of pay whatsoever.

3. In ordering that the Company and the Union cease and desist from engaging in certain acts or alleged unlawful practices, or from interfering with, restraining or coercing employees in the exercise of rights guaranteed by the Act.

Without prejudice to its position elsewhere asserted herein, it is the further position of the Company that the Board erred in the following particulars, to-wit:

1. In failing and refusing to find that the Union was solely responsible for the discrimination, if any, suffered by Underwood and in failing to order that the Union only should be required to make whole Underwood for loss of pay, if any, sustained by Underwood as a result of discrimination, if any.

2. In failing and refusing to find and affirmatively order that Underwood should not be offered employment or awarded back pay because his unwillingness to accept employment opportunities amounted to a willful incurrence of wage losses.

3. In failing and refusing to find and affirmatively order that any award of back pay in favor of Underwood should terminate not later than October 14, 1950.

ARGUMENT

Summary of Argument

Substantial evidence on the record considered as a whole does not support the findings and conclusions of the Board that Underwood was discriminated against by the Company in violation of Sections 8(a)(3) and (1), or that the Union caused the Company to so discriminate in violation of Sections 8(b)(2) and (1)(A).

The evidence does not support a finding that Underwood was discriminatorily refused employment by the Union's referral of Lewis Deyo to the Company's vessel ALASKA on May 5, 1950. The record is barren of evidence that Underwood rather than Deyo was entitled to or would have received the assignment, or that the referral of Deyo to the ALASKA by the Union was for any reason proscribed by the Act.

The removal by the Union of Underwood's name from the Union assignment lists in the week following January 7, 1950, did not constitute discrimination by the Company against Underwood. The act of removing Underwood's name was the act of the Union in which the Company did not participate, of which the Company had no knowledge, and for which the Company cannot be found responsible under any interpretation of the Act.

Even assuming *arguendo* that Underwood was discriminated against, the Board order is improper and invalid in the following respects, to-wit: (1) in failing to order that the Union only should pay back pay, if any; (2) in failing to order affirmatively that Underwood should not be offered employment or back pay

because he engaged in willful incurrence of wage losses; and (3) in failing to order that back pay, if any, in favor of Underwood should terminate not later than October 14, 1950.

I. The Company did not discriminate against Underwood in violation of Sections 8(a)(3) and (1), and the Union did not cause the Company to so discriminate in violation of Sections 8(b)(2) and (1)(A).

Section 8(a)(3) declares it to be an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment * * * to encourage or discourage membership in any labor organization * * *." Aside from proscribing discrimination based upon union considerations, the Act was not designed to prescribe the form or method in which an employer shall recruit and hire employees. The Act does not, nor was it intended to, dictate to an employer that he shall or shall not utilize any particular method or channel for hiring employees. *Phelps Dodge Corp. v. N.L.R.B.,* 313 U.S. 177, 186-7; *Jones & Laughlin Steel Corp. v. N.L.R.B.,* 301 U.S. 1, 45.

Basically, Underwood is opposed *only* to rotary hiring based upon *job availability in the industry* and would prefer a system based upon job availability and seniority *with one company.* This has not been the practice in the maritime industry or with the Company. It is perhaps unfortunate that Underwood entertains these views. But his position and views would be precisely the same under a rotary hiring system operated by employers on an industry-wide basis without the Union in the picture at all.

By his resignation from the Union in December, 1950, and his subsequent applications direct to the Company, Underwood sought preferential status of employment with the Company apart from and by going outside the Union's rotary hiring system; but as the original Wagner Act did " * * * not impose an obligation on the employer to favor union members in hiring employees," *Phelps Dodge Corp. v. N.L.R.B.,* 313 U. S. 177, 186, so the amended Act does not impose an obligation on the employer to favor non-union members in hiring employees. The most that Underwood was entitled to was equality of treatment under the established system. Underwood was at all times afforded that equality; in fact, the record establishes that both the Company and the Union went to great lengths to insure him that equality.

The Board found and concluded (R. 99) that the Company discriminated against Underwood, and that the Union caused the Company to so discriminate by (1) the Union's referral of Lewis Deyo, ahead of Underwood, to the Company's vessel ALASKA on May 5, 1950; and (2) the act of the Union in removing Underwood's name, in the week following January 7, 1950, from the Union assignment lists. Substantial evidence on the record considered as a whole does not support the Board's findings and conclusions in these respects, and the portions of the Board's order predicated thereon cannot be sustained. See *Universal Camera Corp. v. N.L.R.B.,* 340 U.S. 474; *N.L.R.B. v. Pittsburgh S. S. Co.,* 340 U.S. 498.

A. *Underwood was not discriminatorily refused employment by the Union's referral of Lewis Deyo to the position of Second Assistant Radio Officer on the ALASKA on May 5, 1950.*

The findings and conclusions of the Board that Underwood was entitled to referral and should have been referred by the Union ahead of Lewis Deyo on May 5, 1950, to the Company's vessel ALASKA, are based upon unjustified assumption, conjecture and speculation and not upon substantial evidence of record.

Mr. Lundquist, Port Agent for the Union, testified unqualifiedly that Underwood would not have received assignment to *any* permanent job with the Company between January 7, 1950, and November 8, 1950, under the Union's rotary hiring system, *even assuming that Underwood had remained a member of the Union during that period* (R. 230-1). Lundquist explained this in detail with the aid of written exhibits (R. 230-9, Union Exh. 27). Lundquist also testified that not until November 8, 1950, did the assignment occur of the *last man ahead* of Underwood on the Union's assignment list of January 7, 1950 (R. 239). The clear implication from Lundquist's testimony with reference to the assignment of Deyo to the ALASKA on May 5, 1950, was that Deyo was No. 793 on the Union's January 7 assignment list rather than No. 815 as found by the Board (R. 236, Union Exh. 27). Underwood's number was 796 on the January 7 list (R. 230). The evidence does not establish that Underwood's number was lower than Deyo's number on January 7, 1950, or on May 5, 1950.

But even assuming that Deyo's number was actually higher than Underwood's on January 7, 1950, or on

May 5, 1950, there is nothing other than speculation and surmise to establish that the Union's assignment of Deyo to the ALASKA, and not Underwood, was discriminatory within the meaning of the Act, or was predicated in any way upon union considerations. There is *no evidence* that Deyo was referred to the ALASKA ahead of Underwood *because* Deyo was a Union member, if Deyo was then in fact a member of the Union.

The testimony of Lundquist established that between December 1, 1949, and June 1, 1950, radio operators, both union and non-union, were dispatched indiscriminately from the Union's employment offices if they filed applications (R. 255, 220). Lundquist further testified that the employment opportunities of the Union were made equally available to union members and non-union men between December 1, 1949, and July 1, 1950 (R. 255).

To say that the referral by the Union of Deyo instead of Underwood to the ALASKA on May 5, 1950, was *because* of the preferential hiring provision of the 1948 agreement is entirely unwarranted and in complete disregard of the evidence in the case. The Company wrote Underwood on March 29, 1950, and requested him to register at the Union office for dispatch (Gen. Counsel Exh. 9). On the same date the Company wrote the Union and requested that Underwood be dispatched without any discrimination whatsoever and that his registration with the Union be made effective as of December 29, 1950 (Gen. Counsel Exh. 10). Following receipt of the letters, Underwood went to the Union employment office, requested that he be dispatched and so advised the Company (R. 146-7, 174). The Company

and the Union subsequently agreed in an exchange of correspondence on April 12 and April 19, 1950, that Underwood would be dispatched without discrimination (R. 178). This agreement clearly superseded the applicability of the hiring provisions of the 1948 agreement so far as Underwood was concerned.

Underwood was permitted to register by the Union on April 3, 1950, and was offered at least three jobs by the Union before he left for the Alaska cannery on July 23, 1950 (R. 117-8, 132-4, 138-9). Upon his return from Alaska, Underwood again advised the Union of his availability for limited jobs (R. 194), and was thereafter offered several jobs which he refused (R. 155-7, 239-42).

On this evidence there is clearly no basis whatever for a finding that Underwood was discriminated against by the referral of Deyo to the ALASKA on May 5, 1950. The burden of establishing unfair labor practices is on the General Counsel for the Board. *N.L.R.B. v. Reynolds International Pen Co.,* 162 F.(2d) 680, 690 (C.C.A. 7, 1947); *Interlake Iron Corp. v. N.L.R.B.,* 131 F.(2d) 129, 133-4 (C.C.A. 7, 1942). Unjustified assumption, surmise and speculation are not substitutes for proof. *N.L.R.B. v. Amalgamated Meat Cutters,* 202 F. (2d) 671 (C.A. 9, 1953).

The mere existence of an unlawful preferential hiring provision in an agreement does not in and of itself establish a case of discrimination against a specific individual. It is fundamental that an individual does not suffer discrimination within the meaning of the Act unless he himself is deprived of employment because of

union considerations. *Phelps Dodge Corp. v. N.L.R.B.,* 313 U.S. 177, 188; *Republic Steel Corp. v. N.L.R.B.,* 311 U.S. 7, 10-12; *Consolidated Edison Co. v. N.L.R.B.,* 305 U.S. 197, 235-6. There is no evidence in this record that the preferential hiring provision of the 1948 agreement was applied to Underwood in the assignment of Deyo to the Alaska, or at all.

It is likewise difficult to perceive upon what theory the Board concluded that any act of the Company with respect to Underwood in this case was discriminatory or encouraged or discouraged membership in a labor organization within the meaning of Section 8(a)(3). Every action that the Company took in these cases, including its correspondence with the Union and with Underwood, was designed to insure equality of treatment for Underwood under the rotary hiring system. There is no evidence that any official of the Company knew whether Underwood was or was not a member of the Union. Underwood did not indicate to the Company that he had resigned from the Union when he filed his employment application with the Company on December 29, 1949 (R. 127-9). Nothing in the subsequent letters written to the Company by Underwood indicated whether he was or was not a Union member (R. 160-1). The only information the Company had with respect to Underwood was that *he opposed the rotary hiring system,* based essentially upon job availability in the industry, and that he believed that the Company should establish a system based upon seniority *with the Company* which would afford him a better chance of securing employment with the Company (R. 160-1). There is no evidence that Underwood ever called to the Com-

pany's attention any facts putting it on notice that his union or non-union affiliation played any part in his opposition to the rotary hiring system. There is no evidence that Underwood ever advised the Company that the normal channels of employment—the employment offices of the Union—were closed to him by reason of lack of union membership, or for any reason at all. There is no evidence that the Company knew of the union membership status of either Deyo or Underwood at the time Deyo was referred to the ALASKA by the Union.

The evidence wholly fails to establish that Underwood was denied employment by the Company because of union considerations or to encourage or discourage membership in the Union. Underwood's failure to secure employment in fact resulted only from the operation of the perfectly legal rotary hiring aspects of the 1948 agreement, to which rotary hiring aspects Underwood was opposed because he preferred a different system. The Company, by its conduct with respect to Underwood, clearly met any and all obligations imposed upon it by the Act.

B. ***The removal by the Union of Underwood's name from the assignment lists of the Union in the week following January 7, 1950, did not constitute discrimination against Underwood.***

The Board found that the Act of the Union in removing Underwood's name from the assignment list in the week following January 7, 1950, in itself constituted discrimination in violation of Sections 8(a)(1) and (3) by the Company and Sections 8(b)(1)(A) and (2) by the Union (R. 99). This conclusion represents a

novel and wholly unwarranted interpretation of the Act.

The act of removing Underwood's name from the *Union* assignment lists *was the act of the Union.* It is indeed a novel doctrine that the Company engaged in discrimination within the meaning of the Act by an act of the Union in which the Company did not participate or acquiesce and of which the Company had no knowledge whatever. See *Progressive Mine Workers of America v. N.L.R.B.,* 187 F.(2d) 298 (C.A. 7, 1951). Furthermore, the Company had no knowledge of Underwood's union or non-union status at the time the removal of Underwood's name from the Union's assignment lists occurred.

Since the very inception of the Act, the Board and Courts have uniformly held that no finding of discrimination can be made unless it be established that the employer had knowledge of the union or other concerted activities involved. "Discrimination involves an intent to distinguish in the treatment of employees on the basis of union affiliations, or activities, thereby encouraging or discouraging membership in a labor organization, * * *." *Botany Worsted Mills,* 4 NLRB 292, 300. See also *Midland Steel Products Co.,* 11 NLRB 1214, 1225; *Tupelo Garment Co.,* 7 NLRB 408, 414; *Hills Brothers Co.,* 76 NLRB 622, 629; *B. F. Goodrich Co.,* 88 NLRB 550, 552-3; *N.L.R.B. v. Westinghouse Electric Corp.,* 179 F.(2d) 507 (C.A. 6, 1949); *Tampa Times Co. v. N.L.R.B.,* 193 F.(2d) 582 (C.A. 5, 1952); *Progressive*

Mine Workers of America v. N.L.R.B., 187 F.(2d) 298 (C.A. 7, 1951); *Brown v. National Union of Marine Cooks and Stewards,* 104 F. Supp. 685 (N.D. Calif., 1951). There is no basis whatever for the Board's finding that the Company *discriminated* against Underwood by reason of *the act of the Union* in removing Underwood's name from the Union's assignment list.

The Board's position that the Company was accountable for discrimination against Underwood by virtue of the act of the Union in removing Underwood's name from the Union's assignment list is predicated upon the hiring clause of the 1948 agreement which provided preference of employment for Union members (Gen. Counsel Exh. 3, §1). The Board argues that, by virtue of the preferential hiring provision, and the Union's shipping rules then existing, the Company impliedly authorized the removal of Underwood's name from the Union list upon his resignation from the Union (Petitioner's Brief, pp. 19-20).

This argument is not sound because it assumes unjustifiably that a preferential hiring provision will in fact be applied to specific individuals. This unjustified assumption of the Board is completely belied by the evidence in this case which clearly establishes that the Company, upon learning of Underwood's opposition to the Union's rotary hiring system, (1) wrote to Underwood requesting that he register at the employment offices of the Union (Gen. Counsel Exh. 9), (2) wrote to the Union requesting that Underwood (and Hughes) " * * * be dispatched without discrimination as to union

or non-union affiliation or other discrimination whatsoever, anything in our collective bargaining agreement to the contrary notwithstanding" (Gen. Counsel Exh. 10), and (3) subsequently obtained an agreement from the Union that Underwood (and Hughes) would be dispatched without discrimination (R. 178).

Furthermore, the Union interpreted Underwood's letter of resignation (Union Exh. 6) as meaning that Underwood no longer wished to ship through or utilize the Union's employment offices (R. 181, 254). This interpretation of the letter is entirely reasonable and is confirmed by Underwood's own action in applying directly to the Company for employment *even before* his resignation from the Union became effective (R. 126-9, Gen. Counsel Exh. 8). Upon receipt of the Company's letter of March 29, 1950 (Gen. Counsel Exh. 9) Underwood proceeded to go to the Union's employment office to request dispatch in accordance with the Company's request contained in the letter (R. 146-7, 174). Underwood was thereafter offered jobs in normal course through the Union's employment facilities (R. 116-7, 132-4, 138-9, 155-7, 239-42).

Upon this evidence, the Board's finding (R. 99) cannot be sustained that "the act of removing Underwood's name from the assignment list in itself constituted discrimination in violation of Section 8(a)(1) and (3) of the Act by the Respondent Employer and Section 8(b)(1)(A) and (2) of the Act by the Respondent Union."

II. Assuming *arguendo* that discrimination occurred, the Board's order is improper and invalid.

A. *If discrimination occurred, the Board erred in failing to find that the Union was solely responsible therefor, and in failing to order that the Union only should be required to make Underwood whole for resulting loss of wages, if any.*

The Board order directs that the Company and the Union jointly and severally make Underwood whole for any loss of wages suffered as a result of alleged discrimination (R. 104).

The power of the Board to assess back pay liability stems from Section 10(c) of the Act. That section, as amended in 1947, provides that when the Board finds that a union or employer has engaged in unfair labor practices it shall—

> " * * * issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided, that where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him*: * * *." (Emphasis supplied)

The italicized portion of Section 10(c) quoted above was added by Congress in 1947 to clarify the remedial powers of the Board following insertion in the Act of Section 8(b) setting forth and defining union unfair labor practices. Following 1947 the Board has held unions liable for back pay only upon a finding that a un-

ion, in violation of Section 8(b)(2), has caused an employer to discriminate against an employee within the meaning of Section 8(a)(3). See *Colonial Hardwood Flooring Co.,* 84 NLRB 563. Where both union and employer are parties to the proceedings, the Board has failed and refused to assess responsibility for discrimination in any case solely against a union but has imposed a rule of joint and several liability against both employer and labor organization. *H. M. Newman,* 85 NLRB 125; *Acme Mattress Co., Inc.,* 91 NLRB 1010. See *N.L.R.B. v. Pinkerton's National Detective Agency, Inc.,* 202 F.(2d) 230 (C.A. 9, 1953).

This policy of the Board runs directly counter to the clear legislative mandate set forth in the proviso to Section 10(c) that " * * * back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him * * *." The statute clearly directs the entering of a back pay order against the employer *or* labor organization, *as the case may be, responsible* for the discrimination, and in effect *directs the Board to determine the responsible party or parties* upon the facts of the particular case. The legislative history demonstrates the intent of Congress. In *House Report* No. 245 on H. R. 3020, 80th Cong., 1st Sess., the Committee Report stated at page 42 that under the above quoted clause of amended Section 10(c) " * * * the Board may also require a union to reimburse to an employee whom it causes to lose pay the amount that he loses." In *Senate Report* No. 105 on S. 1126, 80th Cong., 1st Sess., the Committee Report stated at page 26 with respect to amended Section 10(c) that "Back pay may be required of either the employer

or the labor organization depending upon which is responsible for the discrimination suffered by the employee." *House Conference Report* No. 510 on H. R. 3020, 80th Cong., 1st Sess., at page 54 referred to the amended Section 10(c) as containing a provision " * * * authorizing the Board to require a labor organization to pay back pay to employees when the labor organization was responsible for the discrimination suffered by the employees."

On the basis of the record in this case it is manifest that the Union was solely responsible for the discrimination, if any, suffered by Underwood. This is *not* a case where the employer *knowingly* acquiesced in coercive acts of a union, by virtue of economic pressure or otherwise. *Cf. N.L.R.B. v. Pinkerton's National Detective Agency, Inc.,* 202 F.(2d) 230 (C.A. 9, 1953). Here the Company had no knowledge of and did not acquiesce in *any* act of the Union resulting in any alleged loss of employment to Underwood. On the contrary, the Company here made every effort to insure equality of treatment to Underwood and initiated and secured an agreement with the Union removing the applicability of the preferential hiring provision of the 1948 agreement so far as Underwood was concerned (R. 178).

If discrimination occurred as alleged in this case the Union was the party solely responsible. The Company cannot be held accountable. The basic purposes of the Act can only be effectuated by assessing back pay liability solely against the Union as the party responsible in accordance with the mandate of amended Section 10(c).

The "joint and several liability" formula consistent-

ly applied by the Board is not immutable. See *Acme Mattress Co., Inc.,* 91 NLRB 1010. The Board is charged with the administration of the Act and with the administrative function of ordering a remedy which *will effectuate the purposes of the Act.* The remedies are not fixed and static but are fluid and adaptable to meet the facts of particular cases. In selecting a remedy, the Board cannot act in utter disregard of the manifest intent of Congress. The Courts have never failed to deny enforcement to Board orders where the remedy directed fails to effectuate the purposes of the Act. *N.L.R.B. v. Fansteel Met. Co.,* 306 U.S. 240; *Southern S. S. Co. v. N.L.R.B.,* 316 U.S. 31; *Indiana Desk Co. v. N.L.R.B.,* 149 F.(2d) 987 (C.C.A. 7, 1945); *N.L.R.B. v. Westinghouse Electric Corp.,* 179 F.(2d) 507 (C.A. 6, 1949).

B. *If discrimination occurred, the Board erred in failing to find and affirmatively order that Underwood should not be offered employment or awarded back pay because his unwillingness to accept employment opportunities amounted to a willful incurrence of wage losses.*

The evidence clearly establishes that Underwood voluntarily engaged in a program of refusing employment offers whereby he willfully incurred wage losses. The record establishes that Underwood was offered at least three jobs by Miller, Port Agent for the Union, which he refused (R. 118, 133-4, 138-9). Following his return from Alaska, Underwood was offered several jobs by the Union between October 9, 1950, and February 27, 1951, all of which he refused (R. 155-7, 239-41). He consistently followed the practice of limiting the categories

of jobs for which he was available (R. 194-5, 241-2, Union Exh. 7).

In view of this evidence, it is clear that Underwood willfully incurred wage losses and no order directing his employment or back pay order should issue in his favor. The Act is remedial, not punitive. *Consolidated Edison Co. v. N.L.R.B.,* 305 U.S. 197, 235-6; *Republic Steel Corp. v. N.L.R.B.,* 311 U.S. 7, 10-12.

C. *If discrimination occurred, the Board erred in failing to find and affirmatively order that any award of back pay in favor of Underwood should terminate not later than October 14, 1950.*

The Board ordered (R. 100, 104) that back pay in favor of Underwood should run from May 3, 1950, to October 14, 1950, inclusive, and from the date the ALASKA returned to service after October 15, 1950, until the Company offered him employment (R. 73-4, 76-7).

The ALASKA laid up for the winter on October 14, 1950 (R. 120-3, 125, Gen. Counsel Exh. 7). The assumption that Underwood would have elected to "stand by" the vessel for a long period of idleness, or should be permitted back pay on any such speculative basis, is contrary to the evidence and to the remedial intent of the Act. Employment opportunities were greater than men available during the winter of 1950-51 (R. 214-5). The evidence also indicates that Dittberner, who was employed on the ALASKA until October 14, 1950 (Gen. Counsel Exh. 7), accepted assignments to the COASTAL MONARCH on or about December 21, 1950, and to the COASTAL RAMBLER on January 31, 1951 (Union Exh. 12,

Gen. Counsel Exh. 7) and did not elect to stand by the ALASKA. Deyo, also employed on the ALASKA until October 14, 1950 (Gen. Counsel Exh. 7) accepted assignment to the HAROLD D. WHITEHEAD on February 5, 1951 (Union Exh. 13), and did not elect to stand by the ALASKA. George D. Johnston also gave up his right to stand by the ALASKA and returned to the Union's active port list (Union Exhs. 9, 10, 11, 12).

Furthermore, the evidence establishes that Underwood was offered and accepted a permanent job on the PACIFICUS, a Coastwise Line vessel operating in the Alaska trade (R. 202-3, 241). This is in all respects equivalent employment as evidenced by the fact that Coastwise Line is a member company of PMA and is governed by the same collective bargaining agreement so far as radio operators are concerned (Gen. Counsel Exh. 3).

In view of the full employment opportunities during the winter following October 14, 1950, and in view of the fact that Underwood was offered and accepted employment on the PACIFICUS, the Board order directing back pay in favor of Underwood following October 14, 1950, is out of harmony with the evidence and with the remedial purposes of the Act. The Board order cannot be sustained in this respect.

CONCLUSION

The Company requests that the Court enter a decree denying the petition herein and refusing to enforce the Board's order, and setting aside the Board's order in its entirety as to the Company or, alternatively, that

the Board's order be modified in such respects as the same may be found to be improper.

Respectfully submitted,

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APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (29 U.S.C.A. §151, *et seq.*), are as follows:

* * *

"RIGHTS OF EMPLOYEES

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

"UNFAIR LABOR PRACTICES

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an un-

fair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of

collective bargaining or the adjustment of grievances;

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

"PREVENTION OF UNFAIR LABOR PRACTICES

"Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * * "

* * *

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, * * * "

* * *

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: * * * "

* * *

"(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the procedings, including the pleadings and testimony

upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * * "

Section 8 (a) (3) was amended in part by Public Law 189, 82d Congress, Chapter 534, 1st Session, approved October 22, 1951. The amendment (Section 18 (b)) provided as follows:

"Sec. 18 * * *

* * *

"(b) Subsection (a) (3) of section 8 of said Act is amended by striking out so much of the first sentence as reads '; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement:' and inserting in lieu thereof the following: 'and has at the time the

agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9 (f), (g), (h), and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement:' ''

* * *